The moderator's closing remarks

May 13th 2009 | Kenneth Cukier

Like God to a believer, copyright is everywhere at all times. It exists especially when we take it for granted. It is at once intangible and physical. It comforts some, yet is also the source of endless disputes. Its legitimacy is always in question—indeed the very doubting is sometimes a symbol of one's faith. There is an almost unbridgeable divide between non-believers, who similarly uphold their views with intense fervour.

But the one thing copyright is not, is sacrosanct: people invented copyright and it is also within our power to change it.

The comparison between copyright and religion is crude and imperfect. But it underscores the degree to which the issue of intellectual property inflames our passions and, alas, sometimes makes it hard to comprehend alternative positions. (And instead of salvation is often self-interest.)

The motion before this assembly does not help: it intentionally strives to divide, and force an opinion on one extreme or another. No milquetoast here. As our debaters quickly acknowledged, and many of the comments from the floor confirmed, the matter is not quite so stark in practice: one can admit that existing copyright laws are terribly flawed yet conclude they do not "do more harm than good," as the debate's motion demands.

Professor Fisher in his rebuttal cites music, newspapers and book publishing to note that copyright supports archaic business models; a new generation "sees the current intellectual-property system as unjust or nonsensical and not worthy of obedience," he says.

Professor Hughes in his rebuttal acknowledges copyright's practical shortcomings: it lasts too long and is overly inclusive. Yet in balancing copyright's benefits and drawbacks, he notes, "there is relatively little practical harm" from the system's less-than-ideal features.

Ultimately, both believe that copyright is important; they differ in whether the right balance has been struck.

Comments from the floor have run the spectrum of views, from anarchic, utopian ideals to militant protect-it-all perspectives. "Creators are increasingly turning their backs on copyright—it is publishers who cling to it for dear life," wrote Fede Heinz. "While copyright legislation is flawed, it is the only protection that I have against those who would endeavour to profit from my creation," argued SteveMacIrl. If there was any consensus from the floor it was

that the copyright term should be less than it is (though what duration is unclear).

As the moderator, as I was thrilled by the intellectual clash and the floor's thoughtful comments. The ideas forced me to re-examine my views a number of times. Yet to my surprise, I was disappointed that one seemingly essential point was never made.

All sides remarked on the outpouring of creativity and expression on the web, blogs, social networking sites and the like. To those against copyright, the phenomenon is used to suggest that a whole body of work is being created outside of copyright's protection, signalling that copyright is not needed. But to those in favour of copyright, it was used in the exact opposite way: as evidence that existing copyright can't be that harmful since output isn't being squelched.

Yet the point can be made even stronger. The outpouring of creativity on the web is happening at least in part precisely *because of* copyright law. Many people may not feel they "own" what they produce, but would be grateful that copyright law exists and automatically attaches itself if they were to stumble upon another site that used it without their permission, took credit, and perhaps even earned a handsome sum. Copyright law protects against that.

Copyright is the hidden backstop that gives people confidence to share their work online. Yet few read the fine print. In some online environments one's words are not one's own. And it may surprise some members of the floor—many who took the time to write thoughtful comments opposing copyright—that this is one such venue.

"By submitting Message to a Forum you are granting The Economist a perpetual, irrevocable, royalty free non-exclusive licence to reproduce, modify, translate, make available, distribute and sub-license the Message in whole or in part and in any form," reads "terms and conditions" for comments submitted to this online debate (online at: http://www.economist.com/about/terms_and_conditions.cfm#8).

Meanwhile, the debate's guest commentators have found less common ground than the debaters. "Advocates of massive copyright reform have yet to demonstrate the parade of horribles that would justify the sweeping revisions they champion," insists Dale Cendali, an attorney at Kirkland & Ellis. Jennifer M. Urban of the University of Southern California's Gould School of Law asserted that the lengthened terms and strengthened penalties of copyright laws means that "creators often cannot move forward. Copyright gets in the way."

Professor Hughes in his closing statement argues that with copyright laws, like speed limits and taxes, we are better off putting up with the

minor drawbacks in return for much gain. Professor Fisher in his closing statement puts forward what he considers remedies to the existing laws' deficiencies; interesting, but it comes at the expense of fully making the case in support of the motion, and replying to his venerable opponent's rebuttal points.

The floor has called for more and better data with which to make a decision on the motion. That is a proposal that *The Economist* certainly endorses. Copyright is not perfect, but nothing in this world is. Yet do existing laws do more harm than good? Vote to have your say.

The proposer's closing remarks

May 13th 2009 | Professor William Fisher

In my previous contributions to this debate, I identified some serious defects in our current copyright system. Several of the comments from the floor have pointed to other major problems in that system. Even my opponent concedes in his rebuttal that there is much room for improvement.

How, then, might we do better? More specifically, how might we modify our laws so as to ensure that the creators of works from which we all benefit are fairly compensated, without needlessly impeding the use of modern technologies to access and share the fruits of the creators' efforts and without hampering consumers' ability to incorporate those fruits into new works of their own? Sketched below are a few reforms that, in combination, could move us in the right direction.

1. The duration of copyright protection should be reduced sharply. We lack sufficient data to locate the economically optimal term precisely, but there is no doubt that it is shorter than the life of the author plus 70 years. A copyright term equal to the life of the author or 40 years from the date a work is "fixed" (whichever is longer) would be more than sufficient.

2. In most legal systems, the two primary "moral rights"—the "right of attribution" (the right to be given credit for one's creations) and the "right of integrity" (the right to prevent modification or destruction of one's creations)—apply to similar kinds of materials and last for similar periods of time. They should be disentangled. The right of attribution should be applied broadly, whereas the right of integrity should be restricted to things like paintings, sculpture, and limited-edition photographic prints, and in particular should not apply to works that can be reproduced verbatim in unlimited numbers.

3. The owners of the copyrights in sound recordings should have the right to control public performances of their works. In most countries, they already do. The reasons why the United States does not currently recognise such a right are not convincing.

4. Digital versions of works of all sorts (music, films, television shows, books, etc) should be subject to a blanket licensing system. People should be free to upload, download, reproduce, watch and listen to an unlimited number of such recordings. The owners of the copyrights in those recordings should be compensated, not through direct payments from consumers, but by being paid shares (in amounts proportional to the relative popularity of their creations) out of a pot of revenue. The money necessary to fill the pot and administer the system could be raised in either of two ways. First, national governments could tax internet service subscriptions and devices commonly used to store or play recordings. Alternatively, internet service providers and groups of copyright owners could negotiate voluntary collective licensing arrangements, which would specify the magnitude of the monthly fees that would be paid by the ISPs on behalf of their customers. The first approach would be more efficient; the second more politically palatable. In either case, the portion of the fund paid periodically to each copyright owner would be determined by estimates of the relative frequency with which his or her works were watched, read, or listened to, ascertained from sampling data, anonymised to protect consumers' privacy.

There are several precedents for both variants of this strategy. Canada, Japan and many European countries already have medium-scale government-run tax and royalty systems designed to supplement the revenues that copyright owners reap through traditional business models, while the United States already employs various smaller public, private and semi-private collective licensing systems. Some of these systems are well designed and work smoothly; others are inefficient or rely on crude sources of data and are thus deservedly unpopular. Relying on lessons learned from these experiments, we could and should design a comprehensive blanket licensing system that would replace, rather than supplement, the à-la-carte and advertisement-based business models that have proved incapable of meeting the challenges—or capitalising on the opportunities—of modern information technologies.

5. Consumers in poor countries should pay less for access to copyrighted materials than consumers in affluent countries. One way to achieve such price differentials would be to make the tax levies or privately negotiated ISP subscription surcharges that finance each country's blanket licensing system for digital recordings proportional to

that country's mean income per head.

6. The fair use doctrine and its cousins (which permit people to make certain uses of copyright materials for free) should be adjusted in two offsetting ways. On one hand, those doctrines should be expanded to authorise all genuinely "transformative" uses of copyrighted materials: mashups, remixes, concordances, trivia books, fan fiction, parodies, satires and so forth. On the other hand, the immunities afforded by those doctrines should be withdrawn from unauthorised non-transformative consumptive uses of copyrighted materials, such as "timeshifting" broadcast television programmes, that undermine substantial potential markets for those materials.

7. Circumvention of technological protection measures should be permitted whenever the circumventer's purpose is to engage in an activity that constitutes a fair use.

8. Copyright owners should once again be required to comply with formalities. Most important, a work published without first being registered with a national copyright office should fall into the public domain. Registrants should be given the option (as they are currently through the non-governmental creative commons system) to relinquish to the public some of their statutory rights. Assignments and licences of copyrights should be invalid unless recorded. The databases of the national copyright registries should be linked, harmonised and made available online, enabling consumers and follow-on innovators easily to ascertain the copyright status of any given work.

Implementation of these proposals would not be easy. Myriad detailed questions would have to be answered to give flesh to these bones. Our copyright laws, trademark laws, rules governing "moral rights," and multilateral intellectual-property treaties would have to be modified in hundreds of ways. But the resultant system would be substantially better than our current regime both for the producers and for the consumers of creative works.

The opposition's closing remarks

May 13th 2009 | Professor Justin Hughes

As this discussion concludes let me thank all the interesting comments from the floor. There seemed to be widespread agreement—but, of course, not unanimity—that some sort of economic incentive for creators is needed and that the present copyright term is too long. There were lots of other interesting themes, too many for either of us to address reasonably in 1000 words….

The proposition before the house asks each of us to consider whether an existing set of law (copyright) does more harm than good or more good than harm. Consider the same proposition for other laws.

Speed limits on our highways and streets do much good and some harm (you are late for work, you have to spend more time with your mother-in-law on that weekend trip). Tax laws do much good and some harm: the good comes from funding government services, redistributing some wealth and positively shaping consumption, savings and investment patterns; the harm comes from the negative effects on consumption, savings and investment patterns (as in tax-deductible McMansions).

In both cases, I am sure the existing laws do more good than harm, although I am sure we can improve our traffic and tax laws.

Similarly, existing copyright laws do tremendous good and do some harm. Some of the negative effects of existing laws are completely unnecessary, and that is why we need to make changes in the law.

But for over a decade, concerned people like William Fisher and Jennifer Urban have been telling us that copyright hampers creativity. The evidence—not the anecdotes—does not confirm that. Consider:

Depending on how you measure it, there are more than 180m blogs worldwide, perhaps 25m bloggers in the United States (in 2008 one source measured 26.4m, another 22.6m).

There are more than 200m people with Facebook pages, and at least 100mi who log on each day.

MySpace has about 125m users, each with their own creative page.

In late 2007, Flickr uploaded the 2 billionth photograph posted to its site, largely by amateur photographers.

In short, a vast explosion of free expression apparently unhampered by copyright.

My learned opponent says I greatly underestimate how much recoding and reworking of copyrighted materials is frustrated by existing law, yet he presents no statistics, just some vague claims. But he does say that "roughly a quarter of young 'digital natives' throughout the world are remixing existing material into 'their own artistic creations such as artwork, photos, stories, videos, or the like'." Yes, precisely: these are the millions above using MySpace, Facebook, blogs and all sorts of other platforms.

Indeed, Professor Fisher acknowledges that "[t]o be sure, many remixers are undeterred" and that the fair use doctrine in the United

States "is helpful," but just concludes that "this isn't a healthy state of affairs".

Well those statistics manifesting online creativity, undeterred by existing copyright law, look pretty healthy to me.

At the same time, I acknowledge that it will be difficult to prove the amount of harm, the "chilling effect", being caused by copyright law. That is something we need to research seriously and get credible data.

Knowing that he cannot quantify the amount of harm copyright causes, my opponent takes an interesting tack: using the troubled state of the record and newspaper industries to argue that copyright is not delivering adequate social good. He adds the book publishing industry to the troubled copyright sectors, on what is thoughtful conjecture, but nothing more than conjecture.

In defending copyright law, I am not out to defend existing business models and, again, I am surprised that my opponent teases us by implying he is.

The internet and, separately, digital production technologies were always going to disrupt the recorded music industry, regardless of file-sharing. With the internet, musicians can connect more directly to consumers (see MySpace), enjoy economic benefits derived from control of the commercial uses of their music (with copyright) and largely supplant or minimise the middlemen.

As for my opponent's fundamental tenet that "[i]nformation technology is rapidly corroding consumers' willingness" to pay for information and entertainment, that is a vast simplification. It is largely wrong for videogames, ring tones, audiovisual works, software and books (again, Professor Fisher just conjectures with books). Moreover, many legitimate free sources of entertainment, like Hulu.com and authorised works on YouTube, are advertising business models based on the exclusive control of copyright law.

I am also surprised at the hint of technological determinism in my opponent's rebuttal. Neither technology nor markets move inextricably in one direction. For example, consumers had been accustomed (for decades) to free terrestrial broadcasts and were permitted to record those works under the fair use doctrine; those consumers widely embraced pay models for the same works: cable television, VHS and DVDs.

As I said at the beginning, intellectual property policy is educated guesswork, but abolishing existing copyright laws because they do more harm than good? Well, that makes for a fun debate, but—with no broad evidence and limited anecdotes—it would be poor, indeed

irresponsible, policymaking. Many reforms of copyright are needed, but the proposition that existing copyright does more harm than good is false.

Featured guest

Ms Jessica Litman

Anglo-American copyright law is designed to encourage authors to create new works and to encourage readers, listeners and viewers to enjoy them. Traditionally, the law has approached those goals by offering profits to intermediaries who invested in works and made them available to the public. For most of copyright law's history, wide public dissemination has required large capital investments. Publishers needed to buy printing presses, binding machines, paper, and ink, and to rent warehouses, hire trucks and pay for shelf space. The copyright law promised publishers the opportunity to earn money by giving them control over the distribution and consumption of the works they invested in. Authors saw few of the proceeds of their works unless they were unusually successful. Readers, viewers and listeners, for their part, had to put up with annoying limitations and delays that publishers employed to assure that their investments secured the largest returns. Books and recordings by creators whose success was only modest, or whose work was new and unproven, were often not worth what it would cost to make thousands of copies and get them on to shelves in stores. Films with no bankable major star would languish in development without getting made. Television series would be cancelled because their core fan groups were too small, or were dominated by less desirable demographics. Few people would have argued that these features were strengths of the Anglo-American market for copyrighted works, but we accepted them as the cost of encouraging intermediaries to distribute works to people who wanted to read, hear and watch them.

In the past 30 years, technology has made printing presses, paper, ink, warehouses, trucks and shelf space optional. Mass dissemination need be expensive no longer. Authors can communicate directly with huge audiences. Readers, listeners and viewers can easily share works of authorship with each other over digital networks across vast distances. As the investment necessary to distribute works shrinks, the incentive that copyright law must promise to distributors can shrink as well. Technology, thus, offers an opportunity to rebalance copyright law to ensure that a larger share of the copyright bargain can be enjoyed by creators and by readers, listeners and viewers. One might therefore expect to see publishers and record labels raising their royalties,

expanding their catalogs, and lowering their prices.

Instead, we have seen the conventional distributors of 20th-century works stampeding each other into a copyright panic, and running to lawmakers with demands for greater control over both distribution and consumption. Lawmakers, for their part, have been happy to oblige them, since copyright-affected industries have a record of generosity to politicians. And for all of the complaining, business for most copyright industries cannot be too terrible. Copyright industry groups appear to have both ample incentives to pressure lawmakers to squelch non-commercial or alternative distribution models, and sufficient resources to lobby and litigate with abandon. Indeed, one can only conclude that publishers, record labels, motion picture studios and other conventional intermediaries attach enormous value to the copyright rights they have been holding, since they are willing to spend huge sums to protect their markets from encroachment by less expensive alternatives. Owners of copyrights in popular recordings are seeking to ensure that non-commercial webcasting is too expensive to survive, by insisting on treating all webcasters like large commercial entities. Commercial publishers of scientific and scholarly articles are pouring efforts into stopping the migration of medical research into free, online open access repositories like Pub Med Central. Film and recording industry associations have spent millions of dollars to sue upstart competitors into bankruptcy.

The behaviour of the legacy distributors of books, recordings and films suggests that current copyright law offers them incentives that are too generous, large enough to inspire them to engage in unproductive and uncompetitive behaviour in their attempt to preserve them. Perhaps the most effective way to reform current copyright laws is to significantly reduce the control conferred upon copyright-owner intermediaries, and redistribute that control to creators and to readers, listeners and viewers. If copyright incentives actually work the way that they are said to, that change would encourage authors to create more works, and encourage readers, listeners and viewers to enjoy more works (or enjoy works more), while encouraging copyright owners to lobby and litigate less. That seems like a win-win solution.

Featured guest

David Lammy MP

I really welcome the debate that is taking place here this week. Copyright laws are important. We need them. They are the means by

which we protect and reward our creators. Copyright law also supports the ongoing investment needed to produce creative works, which in turn provide intellectual advancement, knowledge, pleasure and entertainment, as well as economic benefit to individuals and the wider economy.

But the copyright system is facing some big challenges. The means of distributing creative works has shifted dramatically in the 21st century, as technological change and the internet have made the world a smaller place. These changes have brought greater possibilities and opportunities for creators and creative businesses; enabling them to reach out to global audiences and find new markets. But they have also placed copyright laws and the wider copyright system under pressure, as consumers and new businesses seek to exploit the opportunities provided by this new dispersed and digitised distribution chain. Many businesses are struggling to monetise their content in this new environment, and piracy is a real problem.

This is why I launched the copyright strategy debate in the UK at the end of last year (http://www.ipo.gov.uk/pro-types/pro-copy/c-policy/c-strategy.htm). Copyright needs to confront these challenges and evolve. We need to make sure that the system responds. The framework must enable people to take full advantage of the opportunities that technology provides but it must also protect and reward creativity and investment.

I hope that *The Economist* will continue to take an interest in these important discussions going forward. I am following the debate closely, and will make sure that the comments here inform my copyright strategy work.